

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

74-1044

To be argued by
LLOYD I. ISLER

United States Court of Appeals

For the Second Circuit

74-1044

GEORGE J. WEINER, JR.,

Plaintiff-Appellant,

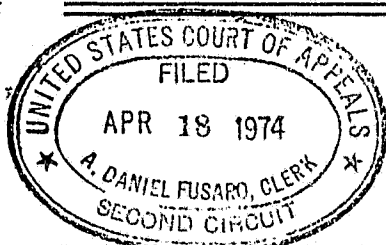
—against—

PAUL MATSCHINER, MICHAEL KULUKUNDIS, CALLIOPE KULUKUNDIS, DONALD L. KUBA, JOSEPH ROSENTHAL, RAM BROADCASTING CORPORATION, RAM BROADCASTING OF CALIFORNIA, INC., RAM BROADCASTING OF COLORADO, INC., RAM BROADCASTING OF CONNECTICUT, INC., RAM BROADCASTING OF FLORIDA, INC., RAM BROADCASTING OF INDIANA, INC., RAM BROADCASTING OF LOUISIANA, INC., RAM BROADCASTING OF MASSACHUSETTS, INC., RAM BROADCASTING OF MICHIGAN, INC., RAM BROADCASTING OF MISSOURI, INC., RAM BROADCASTING OF NEVADA, INC., RAM BROADCASTING OF NEW MEXICO, INC., RAM BROADCASTING OF OHIO, INC., RAM BROADCASTING OF OREGON, INC., RAM BROADCASTING OF SOUTH CAROLINA, INC., RAM BROADCASTING OF TEXAS, INC., and RAM BROADCASTING OF WASHINGTON, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF-APPELLANT'S REPLY BRIEF



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Plaintiff-Appellant,

—against—

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PLAINTIFF-APPELLANT'S REPLY BRIEF

We reply only to highlight the singular nature of respondents' brief.

1. Respondents, in apparent recognition that the determination below cannot be sustained on the basis of the "statute of frauds" provision of the General Obligations Law, § 5-701(1), now retreat to the alternatively asserted

"statute of frauds" provision of the Uniform Commercial Code, § 8-319.

The latter "statute of frauds" relates to contracts for the sale of securities. It provides:

"A contract for the sale of securities is not enforceable by way of action or defense unless

(a) there is some writing signed by the party against whom enforcement is sought . . ."

This statute, the successor to the Uniform Sales Act, is plainly designed to cover "sales transactions".

The contract here pleaded is obviously not a "sales transaction".

Moreover, even assuming that the contract here pleaded is a "sales transaction", it would not fall within its purview because of plaintiff's "performance" under the pleaded agreement (see *Burnside & Co. v. Havener Securities*, 25 A.D. 2d 373, 375).

Plaintiff's performance—"guiding [the defendant Matschiner] in his proposed entry into the communications business"—is "unequivocally referable" to the oral promise, and so brings the agreement within the "exception" rule of the "statute of frauds" relating to "sales".

2. Instead of treating with plaintiff's submission with respect to the District Court's dismissal of the other counts of the complaint on the basis of the "statute of limitations", respondents seek to create an impression of lack of merit to this action by reference to the derivative stockholders' action brought against World (*Niedermeyer v. World Communications Corp.*) and the institution of this action "within five weeks of the dismissal" of that suit* (Resps.' Br., p. 10).

* That dismissal is now on appeal to the New York Court of Appeals.

The fact that plaintiff, as a shareholder of World—having received 15% of its shares under his agreement with Matschiner—is an “interested party” in that stockholders’ derivative action, is evidently of no consequence to his rights under his personal agreement with Matschiner, which is the sole predicate of this suit.

Respectfully submitted,

LLOYD I. ISLER

Attorney for Plaintiff-Appellant

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IS HEREBY ADMITTED
THIS 18th DAY OF April 1974

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Attorney(s) for Wife - Appellee
Matchless in, Pozzetti & Son Companies

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Michael and Collette Kukulinski

